UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES S. PACHECO, Appellant, vs. MATTHEW CARBERRY, Sheriff, San Francisco, California, Appellee.	)	No. 21669

APPELLEE'S BRIEF

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JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus is conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the California State Courts

On August 19, 1964, Indictment No. 64039 was

filed in the San Francisco Superior Court charging appellant with two counts of violation of California Health and Safety Code section 11531 (sale of marijuana) and one count of violation of California Health and Safety Code section 11530.5 (possession of marijuana for sale). On September 10, 1964, appellant moved the trial court to quash a search warrant and suppress evidence obtained as the result of the execution thereof and moved to dismiss each of the charges under California Penal Code section 995. On November 27, 1964, the trial court granted the motion to dismiss one count charging violation of Health and Safety Code section 11531 and denied the motions as to the other counts. On the same date, appellant entered a plea of not guilty.

On January 12, 1965, appellant waived trial by jury and the matter was submitted on the transcript of testimony taken before the grand jury. On February 4, 1965, appellant was found guilty of one count of violation of Health and Safety Code section 11531 and one count of violation of Health and Safety Code section 11530.5.

On February 26, 1965, appellant was sentenced to the state prison for the term prescribed by law on each count with the sentences to run concurrently.

The California Court of Appeal affirmed appellant's conviction on March 17, 1966. People v. Borja and Pacheco, 1/Crim. 5038 (unpublished opinion). Appellant's petition for rehearing to the California Court of Appeal was denied on April 15, 1966. Appellant did not petition for hearing to the California Supreme Court.

On August 12, 1966, appellant filed a petition for a writ of habeas corpus with the California Supreme Court. This petition was denied without opinion on August 31, 1966.

B. Proceedings in the United States Courts.

On November 7, 1966, appellant petitioned for a writ of habeas corpus to the United States District Court for the Northern District of California, Action No. 45947, in the files of that court. Without having issued an order to show cause, the district court denied appellant's petition on November 9, 1966.

On December 7, 1966, the district court ordered there was probable cause to appeal and on December 8, 1966, appellant's notice of appeal to the Court of Appeals for the Ninth Circuit was filed.

This brief represents the first appearance of the California Attorney General in this matter in the federal courts.

SUMMARY OF APPELLEE'S ARGUMENT

The district court properly denied appellant's petition for habeas corpus for the following reasons:

I. Appellant has failed to exhaust his remedies presently available in the California state courts as to all issues raised in the petition to the district court and in this appeal except the issue of whether the affidavit in support of the search warrant was a sufficient statement of probable cause to justify issuance of the warrant.

II. The affidavit in support of the search warrant was a sufficient statement of probable cause to justify issuance of the warrant.

III. The admission into evidence of appellant's statements to the police was not error under applicable federal law.

IV. Whether appellant's conviction of violation of California Health and Safety Code section 11531 was in part based on hearsay evidence raises no federal question.

ARGUMENT

I

APPELLANT HAS FAILED TO EXHAUST HIS REMEDIES PRESENTLY AVAILABLE IN THE CALIFORNIA STATE COURTS AS TO ALL ISSUES RAISED IN THE PETITION TO THE DISTRICT COURT AND IN THIS APPEAL EXCEPT THE ISSUE OF WHETHER THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS A SUFFICIENT STATEMENT OF PROBABLE CAUSE TO JUSTIFY ISSUANCE OF THE WARRANT.

Appellant's petition to the District Court for a writ of habeas corpus attacks the validity of his conviction on several grounds, only one of which has been presented to the California state courts on collateral attack by way of a petition for a writ of habeas corpus to the California Supreme Court. A copy of this petition, filed with the California Supreme Court on August 12, 1966 in Crim. No. 10311, is attached hereto and made a part hereof, and is "EXHIBIT A."

Appellant's petition to the California Supreme Court attacked the validity of his conviction on the sole ground that the trial court committed reversible error by admitting into evidence contraband seized at his home pursuant to a search warrant which was invalid by reason of the failure of its supporting affidavit to manifest probable cause to search.

Whatever the merit of any other issues raised in

appellant's petition to the District Court, petitioner's failure to have invoked available remedies in the California state courts precluded their consideration by the court below. 28 U.S.C. § 2254.

This Court's review of the District Court's denial of appellant's petition is therefore restricted to the narrow issue of whether the affidavit in support of the search warrant (CT 38-39) is a sufficient statement of probable cause to search,

II

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS A SUFFICIENT STATEMENT OF PROBABLE CAUSE TO JUSTIFY ISSUANCE OF THE WARRANT.

The affidavit in support of the search warrant is clearly a sufficient statement of probable cause required by the Fourth Amendment to the United States Constitution to justify issuance of the search warrant. The text of the affidavit appears in the clerk's transcript on this appeal at pages 38-39.

The purpose of an affidavit is to enable the issuing magistrate to determine whether probable cause required by the Fourth Amendment is present and hence that a search warrant may properly issue. Giordenello v. United States, 357 U.S. 480, 486 (1958). Where, as here,

the affidavit includes information received from an informer not before the issuing magistrate the affidavit must inform the magistrate of two things: (1) some of the underlying circumstances from which the affiant concluded that the informant was credible or his information reliable, and (2) the underlying circumstances from which the informant concluded that the narcotics or other contraband were where he claimed they were. Aguilar v. Texas, 378 U.S. 108, 114 (1964).

The affidavit in the case at bar includes information received from two named informants, to wit, Ricco Jiminez and Frank Borja. The above standards, therefore, should be applied to the information received from each of these men. It is abundantly clear that a magistrate is justified in concluding that an informant is reliable where an affiant states that on several past occasions the informant has given information to the affiant which has proved to be accurate and has resulted in arrests and convictions. See, e.g., McCray v. Illinois, ___ U.S. ___, 35 U.S.L.Week 4261 (1967); Draper v. United States, 358 U.S. 307 (1959). The affidavit in the case at bar states that Ricco Jiminez had furnished information which had resulted in the arrest and conviction of three narcotic offenders. This statement is sufficient to justify the magistrate in concluding that Ricco Jiminez was a reliable

informant. This being so, the following information could properly be considered by the magistrate in determining whether issuance of the search warrant was justified: Frank Borja told Jiminez that he obtained the marijuana, which he had just sold to Jiminez, from James Pacheco, the occupant of 1237 Carolina Street.

There remains the question of whether the information contained in Frank Borja's statement to Jiminez is reliable and could therefore properly be considered by the magistrate in determining whether issuance of the search warrant was justified. It is axiomatic that the reliability of an informer may be established by the personal observations of the affiant. See United States v. Ventresca, 380 U.S. 102, 110-11 (1965). In the instant affidavit the affiant states his personal observations of the informant Frank Borja which tend to corroborate and establish the reliability of Borja's statement to Ricco Jiminez. Thus, the affiant personally observed Borja enter the premises at 1237 Carolina Street, leave the premises shortly thereafter, walk a short distance up the street, and sell a quantity of marijuana to Ricco Jiminez. These personal observations of the affiant constitute independent justification for the affiant and the magistrate to conclude that Borja's statement that

he got the marijuana at the residence was in fact true. The credibility of Borja's statement to Jiminez is further reinforced by the fact that the affiant personally observed Borja engage in identical conduct on each of the two sales to Jiminez on July 8 and July 14, 1964.

For the above reasons, respondent submits that the affidavit in support of the search warrant constituted a statement of probable cause which is sufficient under the Fourth Amendment to justify issuance of the search warrant. Moreover, even were the affidavit in this case deemed to be a doubtful or marginal statement of probable cause the resolution of the issue of whether the affidavit is sufficient should be largely determined by the preference accorded to warrants. United States v. Ventresca, supra at 109.

Appellant's opening brief includes the additional allegation that the affidavit and search warrant are defective because both were executed on July 22, 1964, one week after the occurrence of the conduct on which the warrant was based. Appellant argues that this time lapse of one week precludes a showing of then-existing probable cause.

Although courts have generally held that a delay of more than thirty days operates to invalidate a search warrant, the passage of less time does not necessarily

do so. Example cases are collected in Annotation, 100 A.L.R.2d 525 (1965), and Annotation, 162 A.L.R. 1406 (1946). Moreover, California Penal Code section 1534 provides that a search warrant may be executed within 10 days of its issuance and if it is not so executed the warrant is void.

The facts recited in the affidavit in the case at bar justify the magistrate's conclusion that although the most recent conduct on which the warrant was based occurred one week before its issuance there was nevertheless then-existing probable cause to search the identified residence. The affidavit justified the conclusion that the marijuana which Borja sold to Jiminez on July 8, 1964, and on July 14, 1964, was in each instance first obtained from appellant's residence immediately prior to the sale. The pattern of events over the two preceding weeks would lead a man of reasonable caution to believe that the contraband would be in the house on the third week when the search warrant was issued, July 22, 1964.

III

THE ADMISSION INTO EVIDENCE OF APPELLANT'S STATEMENTS TO THE POLICE WAS NOT ERROR UNDER APPLICABLE FEDERAL LAW.

As was noted in Argument I above, the issue of

whether it was reversible error under applicable federal law for the trial court to have admitted into evidence statements which appellant made to the police has not been presented to the California state courts in a proceeding for post-conviction relief by way of collateral attack on appellant's conviction. For this reason, the issue should not be considered in a petition to a federal court for a writ of habeas corpus. 28 U.S.C. § 2254. By including in this brief the following discussion which disposes of this issue on the merits appellee does not concede that the issue is properly before this Court.

. The record on appeal to this Court makes it abundantly clear that the admission into evidence of appellant's statements to the police was not error under applicable federal law.

The California Court of Appeal determined that the admission into evidence of appellant's statements violated the rule announced in Escobedo v. Illinois, 378 U.S. 478 (1964), but was nevertheless not reversible error under Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963).* This determination of the California Court of Appeal was

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* The opinion of the California Court of Appeal is attached hereto and is "EXHIBIT B." The portion of the court's holding referred to above appears at page 9 of this opinion.

made without benefit of the opinion of the United States Supreme Court in Johnson v. New Jersey, 384 U.S. 719 (1966). In that case, the Supreme Court made a clear statement of its holding in the Escobedo case:

> "Apart from its broad implication, the precise holding of Escobedo was that statements elicited by the police during an interrogation may not be used against the accused at a criminal trial, '[where the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent . . . .'" 384 U.S. at 733-34.

This statement of the holding in Escobedo is in the conjunctive so that absent any one of its several elements the admissibility of an accused's statements to the

police must be determined according to the long established rules regarding voluntariness rather than according to the holding of that case. See Johnson v. New Jersey, supra, at 732-33.

The automatic exclusionary rule announced in Escobedo is inapplicable to the statements which appellant made to the police because there is no evidence that appellant had requested an opportunity to consult with his attorney prior to having made these statements, nor is there any such allegation in the petition to the District Court. The District Court correctly determined that appellant's failure to have requested counsel prior to making his statements precludes application of the Escobedo rule. Johnson v. New Jersey, supra; VonSchmidt v. United States, 366 F.2d 773 (9th Cir. 1966). Appellant's trial having occurred prior to June 13, 1966, he cannot avail himself of the more encompassing doctrine of Miranda v. Arizona, 384 U.S. 436 (1966). Johnson v. New Jersey, supra.

For the above reasons, there is no allegation in the petition to the District Court which would justify a determination that the trial court erred as a matter of federal law by having admitted into evidence appellant's statements.

IV

WHETHER APPELLANT'S CONVICTION OF VIOLATION OF CALIFORNIA HEALTH AND SAFETY CODE SECTION 11531 WAS IN PART BASED ON HEARSAY EVIDENCE RAISES NO FEDERAL QUESTION.

In his last argument appellant contends that there was such an insufficiency of evidence in support of the charge of sale of marijuana that his conviction thereof amounts to a violation of due process of law. Appellant contends that the only evidence supporting this charge was the testimony of the informer Ricco Jiminez that Frank Borja told him he obtained the marijuana he sold to Jiminez from appellant and that such evidence is inadmissible hearsay.

Appellant's contention is utterly devoid of merit because on the one hand, it fails to raise any federal issue and on the other hand, is wrong as a matter of fact. Even if appellant's conviction for sale of marijuana were based on hearsay evidence inadmissible under the state rules of evidence, it would not thereby impair any right which appellant is entitled to under the United States Constitution. In any event, appellant's argument lacks merit because there was other evidence supporting his conviction for sale of marijuana. The evidence, independent of any statement made by Frank Borja, which supports this conviction is discussed by the California

Court of Appeal on page 9 of its opinion (Exhibit B, p. 9), and appears at pages 4-6 of the reporter's transcript of proceedings before the grand jury.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court denying the petition for writ of habeas corpus should be affirmed.

DATED: June 2, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

Karl S. Mayer

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CR SF
66-1202

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

June 2, 1967

Karl S. Mayer

KARL S. MAYER
Deputy Attorney General
of the State of California

E X H I B I T "A"

[illegible] 10811

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE APPLICATION OF JAMES S. PACHECO FOR A WRIT OF HABEAS CORPUS.

Filed 8-12-66

PETITION FOR WRIT OF HABEAS CORPUS

66-1202

Petitioner, JAMES S. PACHECO, by and through his attorney, EDWARD L. CRAGEN, respectfully petitions this Court for a Writ of Habeas Corpus and respectfully shows:

I

Petitioner filed a timely Notice of Appeal in the Superior Court of the State of California in and for the City and County of San Francisco in the matter of "PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff vs. JAMES S. PACHECO, et al., Defendants," being Action No. 64039 in said Court. Thereafter he perfected his appeal in the District Court of Appeal of the State of California First Appellate District, Division Three, in Action No. 1 Crim. 5038; that on or about March 17, 1966, the judgment of conviction as to petitioner was affirmed and Opinion certified for non-publication, a copy of which said Opinion is attached hereto as Exhibit "A", and included herein by reference as if fully set forth at length. On April 4, 1966, petitioner filed in the said District Court of Appeal a Petition for Rehearing. On April 15, 1966,

Rehearing was denied. No Petition for Hearing was filed in this Court. On May 17, 1966, remittitur was forwarded to the County Clerk of the City and County of San Francisco and Ex officio Clerk of the Superior Court of the City and County of San Francisco to be spread on the Minutes. Time of Petition for Hearing in this Court has passed.

II

Reference is hereby made to the complete file in the aforesaid action No. 1 Crim. 5038, and by said reference the matters contained therein are incorporated herein as if set forth at length.

III

In the action below a search warrant which produced the only evidence against petitioner was issued on the strength of a hearsay affidavit. The affidavit appears in its entirety in the file of the District Court and was included because the petitioner at all times challenged the hearsay as being insufficient as a matter of law. A copy of said affidavit is lodged concurrently herewith.

IV

The reason for this petition is based on the grounds that there are no standards for the sufficiency of search warrants in this state as of this date. The decisions which this Court has made concerning search warrants have all been replaced by two recent United States Supreme Court cases

which said cases set forth stricter standards for the supervision of the issuance of search warrants. See Jones vs. United States, 362 U.S. 257, and Aguilar vs. Texas, 378 U.S. 108, (the stricter federal standards are contrary to the California holdings in People vs. Acosta, 142 CA 2d 59, and Arata vs. Superior Court, 153 CA 2d 767, wherein California has held that hearsay testimony is of and in itself sufficient to justify issuance of a search warrant). Admission of evidence secured through use of a search warrant issued on a basis of insufficient corroborating hearsay testimony contravenes the Fourth and Fourteenth Amendments to the United States Constitution.

V

Petitioner is informed and believes and upon information and belief alleges that there are conflicting opinions by the various District Courts of Appeal in the State of California regarding the application of federal standards to state search warrants. Upon information and belief he further alleges that these opinions have been certified for nonpublication under California rules of court, Rule 976. Because of the said conflict of opinions and certification for nonpublication, he was and is unable to present to this Court California case authority to support his position. Rule 976 has provided for an Appellate Star Chamber whereby the certification for nonpublication of opinions (other than petitioners) deprive him of citing California authorities to

substantiate his claims, resulting in the deprivation of his liberty without due process of law and contrary to the Fifth and Fourteenth Amendments to the Constitution. Rule 976 Sub Sec. (c) also is repugnant to Article 6, Sec. 16 of the California Constitution which provides:

> "The Legislature shall provide for the speedy publication of such opinions of the Supreme Court and of the district courts of appeal as the Supreme Court may deem expedient, and all opinions shall be free for publication by any person." (Emphasis added.)

Article 6, Sec. 16 places the discretion, if any, as to whether an opinion shall be published in the Supreme Court and no other court. Rule 976 (c) attempts to delegate this authority to the District Courts of Appeal. By rules of statutory construction, this authority cannot be delegated.

Thus, petitioner has been denied due process of law in the trial and the appeal of this matter. (See also Article I, Sec. 13).

VI

Petitioner has no adequate remedy at law.

VII

No prior applications for Writ of Habeas Corpus have been made and this petition is filed in this Court because the courts below have implicitly ruled against this application in findings in the trial court and decision in the District Court of Appeal.

WHEREFORE, petitioner requests that a Writ of Habeas Corpus be issued out of and under the seal of the Court, directed to MATTHEW CARBERRY, Sheriff, ordering him to release the petitioner from custody forthwith, or, in the alternative, that an Order to Show Cause issue to direct the said MATTHEW CARBERRY to show cause before this Court at a time and place set by this Court why said Writ should not issue.

Edward L. Cragen

EDWARD L. CRAGEN
Attorney for Petitioner

JAMES S. PACHECO, being duly sworn, deposes and says: He is the petitioner in the within petition for Writ of Habeas Corpus; that he has read the contents of the said petition and the same is true of his own knowledge except as to matters set forth therein upon information and belief and as to those matters he believes them to be true.

The foregoing is true and correct under penalty of perjury.

Dated at San Francisco, California, this 11th day of August, 1966.

James S Pacheco

Petitioner

E X H I B I T "B"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. FRANK FELIX BORJA and JAMES SELOSTIANO PACHECO, Defendants and Appellants.	1 Crim. No. 5038

Appellants Frank Borja and James Pacheco were each charged with two counts of sale of marijuana (Health & Saf. Code §11531). The first sale allegedly took place on July 8, 1964, and the second on July 14th. In a third count, appellant Pacheco was charged with possession of marijuana for sale (Health & Saf. Code §11530.5). Count I of the indictment, charging both Borja and Pacheco with sale, was dismissed as to Pacheco. Borja was found guilty on both counts of sale. Pacheco was found guilty on one count of sale (July 14th), and guilty also on the count of possession for purposes of sale.

The circumstances leading up to the charges against appellants were these: In July 1964 one Agapito Jiminez was working as an undercover man with the San Francisco police. On July 8th Jiminez and two police officers drove to the vicinity of Borja's home. Jiminez left the car and later purchased marijuana from Borja and then returned with it to the police vehicle. On July

14th, Jiminez again contacted Borja for the purpose of buying marijuana. Borja left the presence of Jiminez but Jiminez followed and saw Borja enter the home of Pacheco, where he remained for about 15 minutes. When Borja returned he had a quantity of marijuana concealed beneath his sweater. Jiminez noticed the bulge in Borja's sweater which had not been present when Borja left to go to Pacheco's house. Two San Francisco police officers observed Borja while in the company of Jiminez, and saw him go to and come from the home of Pacheco. Jiminez bought the marijuana Borja brought to him on July 14th.

Contentions of appellant Borja

Count I charged Borja with sale of marijuana on July 8th. He contends that the trial court committed error when it first dismissed this count as to him, and later reinstated it and found him guilty of the offense therein charged.

It appears that both appellants moved to set aside the indictment, and that Pacheco also moved to suppress the search warrant issued for the search of his home. The motion to set aside the indictment was made on September 10th. While the record is not entirely clear, it appears that the court called for briefs, later submitted the matter, and finally ruled upon the motion on November 27th. In ruling on the matter the court stated: "THE COURT: I will grant the motion on Count 1, was it? MR. SHAW: Yes, Your Honor. THE COURT: And deny the motion on Count - - - was it 2 or 3? THE CLERK: There was Count 3 as to Pacheco only. THE COURT: All right. . . ."

On January 12, 1965 counsel for appellants announced to the court that he was prepared to submit the charges on the transcript of testimony before the grand jury. Counsel indicated his belief that there were two counts then pending against each of the appellants. The transcript was presented to the court, each side reserving the right to produce additional evidence, and the matter was then continued for further proceedings.

On February 4th appellants were again before the court. The court announced: "I understand that the record shows that I dismissed Count I against both. Of course, the intention was only to dismiss it as to Pacheco. . . Let the record show that I dismissed on Pacheco only."

Appellants' counsel took no exception to these remarks of the court. No further evidence was offered by either side, and after some further discussion between court and counsel the court announced its decision, finding both appellants guilty ". . . on the remaining counts."

We find no merit in Borja's contention that the court was without power to set aside its order of November 27th dismissing count I. In count I both Borja and Pacheco were charged with sale of marijuana on July 8th. It is true that the court purported to dismiss count I, without specifically stating that the dismissal affected only Pacheco and not Borja. Later, however, the court clearly indicated that its intention in ruling on the motion was to dismiss the first count as to Pacheco only. Dismissal of count I as to Borja was thus inadvertent, and made under the mistaken belief

that it related to Pacheco only. Under such circumstances, the court had power to set aside its previous order, and to enter a new order speaking the truth and reflecting the court's intention at the time the first order was made. (Bartsch v. Brown, 19 Cal.2d 209, 214; 3 Witkin, Cal. Procedure, pp. 1999, 2000, and cases cited.

Borja next contends that his statements made to the undercover agent on the occasion of the sale on July 14th were received in evidence in violation of his right to counsel as declared in such cases as Escobedo v. Illinois, 378 U.S. 478, and People v. Dorado, 62 Cal.2d 338. This contention cannot be supported. This same argument was advanced in People v. Sogoian, 232 Cal.App.2d 430, 434, where the court concluded that operations of an undercover officer in dealing with a willing supplier of narcotics did not come within the rule of the Escobedo or Dorado cases. Here, of course, at the time Borja made the sale of July 14th to Jiminez, Borja had not been taken into custody, nor did Jiminez conduct any interrogation designed to get Borja to confess or make any incriminating admissions of criminal activity. It is clear that the essential requirements for the application of rules stated in both Escobedo and Dorado are absent from our facts.

Borja's final argument is that his defense of entrapment bars prosecution for the offenses charged. He contends that the crimes of which he was accused originated in the minds of the police officers, and that he was lured into their commission. (See People v. Benford, 53 Cal.2d 1, 7, 13.) This defense is not sup-

ported by the record. Entrapment is an affirmative defense and one asserting it has the burden of showing that he was induced to commit the offense for which he is charged. (People v. Braddock, 41 Cal.2d 794, 803.) Here, a fair reading of the testimony of the undercover agent discloses only that the latter contacted Borja on both July 8th and 14th, and provided Borja with an opportunity to make the illegal sales. The testimony further reveals discussion between Borja and Jiminez concerning Borja's plan to leave town and possibly turn over his business to his buyer, who he thought was a dealer in narcotics. Plainly enough, these facts show not a trap for an unwary and innocent citizen, but, as was said in Sherman v. United States, 356 U.S. 369, 372, they disclose a ". . . trap for the unwary criminal." (See also People v. Harris, 210 Cal.App.2d 613, 616.) Where, as here, all that is shown is the ordinary circumstance of a sale of marijuana between a willing buyer and a willing seller, the defense of entrapment is not established, even though the buyer is an undercover agent working with the police.

Contentions of appellant Pacheco

Appellant Pacheco first contends that the search of his residence was illegal because the search warrant issued by a magistrate was based upon an insufficient affidavit.

The affidavit to support issuance of the search warrant was made by officer Schneider. He stated that on July 8th and July 14th, 1964 he observed Borja enter the premises at 1237 Carolina Street (Pacheco's home), leave the premises shortly thereafter,

walk a short distance up the street and sell [illegible] marijuana to Rico Jiminez, a reliable informant. The officer further stated in the affidavit that ". . . Jiminez stated to affiant that Frank Borja stated to Jiminez that he obtained the marijuana on each of these sales to Jiminez from James Pacheco, the occupant of 1237 Carolina Street." Other allegations in the affidavit established that Jiminez was a reliable informant who in the past had submitted information to the police resulting in the arrest and conviction of narcotics offenders

We conclude that the affidavit presented to the magistrate was sufficient to justify the issuance of a search warrant. The purpose of the affidavit is to enable the magistrate to determine whether "probable cause" required by the Fourth Amendment to the United States Constitution is present and hence that a search warrant may properly issue. (Giordenello v. United States, 357 U.S. 480, 486.) Such an affidavit is not insufficient merely because it contains some hearsay statements of an informant, providing that other circumstances and facts are disclosed by the affidavit from which the magistrate can reasonably conclude that probable cause for the issuance of a search warrant is established. (See Jones v. United States, 362 U.S. 257; Rugendorf v. United States, 376 U.S. 528.) Here officer Schneider's affidavit disclosed circumstances and facts revealing his own observation of the sale of marijuana from Borja to Jiminez on July 8th and 14th, and established the fact that immediately before these sales

Borja had visited the home of Pacheco [illegible] to the hearsay statements of Jiminez in the [illegible] together they justify the magistrate's finding of reasonable cause and support the issuance of the warrant.

Appellant's reliance upon Aguilar v. [illegible] 378 U.S. 108 is misplaced. In that case the affidavit upon which the warrant issued was pure hearsay. No facts were stated other than the bare assertion that affiants had received "reliable information from a credible person. . . ." that narcotics were kept at the described premises.

Appellant Pacheco also contends that his incriminating statements were received in evidence in violation of his constitutional right to counsel, citing Escobedo and Dorado. Pursuant to the search warrant, the officers entered Pacheco's home and there questioned him about narcotics. Appellant went into his bedroom and produced a large paper bag containing many smaller bags of marijuana. Appellant made two statements, the first to the general effect that "32 lids would. . . come to approximately a kilo", and the second that he ". . . had been pushing $12,000 a year in the sale of marijuana, not counting the sale of dangerous drugs", and that he had been engaged in this activity for approximately seven years. There is no showing that, at the time appellant made these statements to the officers he had been told of his right to counsel and his right to remain silent. It is also clear that suspicion had focused upon him, that he was in custody, and it is a reasonable inference that the purpose of the questioning by the officer was

to secure a confession, or at least admissions concerning his possession of marijuana for sale. Hence, admission of appellant's statements into evidence did violate the rule of the Escobedo case, and is contrary to principles set forth in People v. Dorado, supra. We conclude, however, that the error does not compel reversal of the judgment. Appellant was charged with possession of marijuana for purpose of sale. (Health & Saf Code §11530.5.) As will be seen from an examination of appellant's statements, they do not amount to a confession of the charged offense. The error, therefore, is not one that rises to the dignity of reversible error per se, but is subject to the test of prejudice. (See People v. Hillery, 62 Cal.2d 692, 712; People v. Luker, 63 A.C. 485.) We look to the record to determine if the introduction into evidence of appellant's statements caused prejudice. We do not believe such prejudice occurred here. Apart from appellant's statements there is a great deal of other evidence pointing to his guilt of the charged offense. Borja, a known seller of marijuana, was twice observed entering appellant Pacheco's house. On each occasion he remained there for a short time and then returned to the street to make a sale of marijuana. Jiminez testified in effect that on the occasion of the second sale he saw no bulge in Borja's sweater when he first met him but when Borja returned from Pacheco's house, there was a bulge in his sweater. Jiminez thereafter observed Borja remove several packets of marijuana from underneath his sweater; he then sold these packets to Jiminez. Further, appellant produced a large bag from his bedroom. It con-

tained many smaller bags of narcotics [illegible] officers. This evidence is persuasive of [illegible] apart from his statements to the officers. [illegible] statements, it is difficult to see how any jury [illegible] one of guilt of the charges of sale and possession [illegible] have resulted from the evidence before the court. [illegible] Connecticut, 375 U.S. 85, 86-87; Cal. Constitution, Art. VI, § 4 1/2; People v. Watson, 46 Cal 2d 818, 836.)

Appellant's final contention is that there is no proper evidence in the record to support his conviction on the charge of sale of marijuana (Health & Saf. Code §11531) or on the charge of possession of marijuana for sale (Health & Saf. Code §11530.5). But there is sufficient evidence to support appellant's conviction on both counts. Although the case was submitted to the court on the basis of the transcript of proceedings before the grand jury, and no additional evidence was received, we must apply the usual rules of appellate review. Thus we may not set the judgment aside if there is any sufficient substantial evidence to uphold it. (People v. Newland, 15 Cal.2d 678, 681.) Appellant's conviction on the count of sale is supported by the testimony of Jiminez, which shows that before Borja left to go to appellant's house, Jiminez looked for bulges under Borja's clothing, having in mind the possibility of a concealed weapon, and saw nothing unusual; that when Borja returned from appellant's house, however, there was a bulge beneath Borja's sweater, caused by the quantity of marijuana he carried, and thereafter sold to Jiminez.

Appellant's conviction on the count of possession of marijuana for sale is fully sustained by the evidence which shows his possession of a large quantity of marijuana, packaged in many separate, smaller packages. The court could reasonably infer from this fact that possession of a large quantity of narcotics, packaged in many smaller packets, was for the purpose of making its sale more convenient and rapid when the opportunity for sale presented itself. (See People v. Robbins, 225 Cal.App.2d 177, 180, 184; People v. Coblentz, 229 Cal.App.2d 296, 302.)

The judgment as to each defendant is affirmed.

Salsman, J.

We concur:

Draper, P.J.

Devine, J.

Certification of Nonpublication

This opinion does not require publication in the advance sheets of official reports, under the standards provided by rule 976 of the California Rules of Court.

Draper, P.J.

Salsman, J.

Devine, J.